Supreme Court, U.S.
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No. 09-1535

In The Supreme Court of the United States

LANA PEREZ and ELENA LEFFLER,

Petitioners,

v.

SAKS FIFTH AVENUE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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I. PETITIONERS DID NOT WAIVE THE QUESTION PRESENTED

Respondent objects that in the courts below petitioners did not challenge the Eleventh Circuit's "mere conduit" standard. (Br. Opp. 7-8). That mere conduit standard, however, has been the controlling law in the Eleventh Circuit for twelve years. Since the standard was first announced in *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir.1998), the Eleventh Circuit itself has applied this rule in nine other cases.[1]

It would have been pointless, if not vexatious, for petitioners to have asked the trial judge to disregard controlling Eleventh Circuit legal standards, and to "argue for a different standard." (Br. Opp. 7). It would have been entirely improper for the District Judge to violate the mere conduit standard established by *Llampallas*, even if the judge disagreed with that requirement. Similarly, the appellate panel which

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[1] *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 368 Fed Appx. 49, 51 (11th Cir.2010); *Dwyer v. Ethan Allen Retail, Inc*, 325 Fed Appx. 755, 757 (11th Cir.2009); *Shockley v. HealthSouth Central Georgia Rehabilitation Hosp*, 293 Fed Appx. 742, 746 (11th Cir.2008); *Malu v. City of Gainesville*, 270 Fed.Appx. 945, 949 (11th Cir.2008); *Roberts v. Randstad North America, Inc.*, 231 Fed.Appx. 890, 895 (11th Cir.2007); *Tucker v. Housing Authority of Birmingham Dist.*, 229 Fed.Appx. 820, 822-23 (11th Cir.2007); *Hampton v. City of South Miami*, 186 Fed.Appx. 967, 970 n.3 (11th Cir.2006); *Quinn v. Monroe County*, 330 F.3d 1230, 1327 (11th Cir.2003); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir.1999).

considered this case was itself bound by the decisions in *Llampallas* and its progeny, which have long been controlling law of the circuit. Again, it would have been quite pointless, indeed inappropriate, for petitioners to have asked that panel to refuse to apply the binding mere conduit standard.

The procedural posture of the instant case in this regard is similar[2] to that in *Staub v. Proctor Hospital*, No. 09-400. In *Staub*, the respondent objected that the petitioner had failed to object in the lower courts to the Seventh Circuit's "cat's paw" standard.[3] The petitioner in *Staub* pointed out in response that there, as here, because the legal standard in question was well established and governed by controlling circuit law, a litigant in that circuit was not required to ask the lower courts to disregard a standard which those courts were clearly obligated to follow.[4] The United States, in its amicus brief in *Staub*, agreed that it would have been futile for Staub to have

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[2] In this case, unlike *Staub*, petitioners took the additional step of raising this issue when they filed a petition for rehearing en banc in the court of appeals. That petition expressly noted that "[a]t least three different formulations of the cat's paw doctrine exist in the circuit courts of appeals and [the issue] is ripe for Supreme Court review." Petition for Panel Rehearing and Suggestion for Rehearing En Banc, at 11.

[3] Brief in Opposition, *Staub v. Proctor Hospital*, No. 09-400, at 16-20.

[4] Petitioner's Reply Brief, *Staub v. Proctor Hospital*, No. 09-400, at 10-11.

raised this issue in the lower courts.[5] Given that procedural posture, which was essentially the same as in the instant case, this Court granted certiorari.

The position taken by petitioners in the courts below thus did not waive their right to seek review by this Court of the mere conduit theory that those courts were required to apply.

II. THE COURT OF APPEALS HAS NOT ADDRESSED, BUT MAY CONSIDER ON REMAND, RESPONDENT'S CONTENTION THAT THE ULTIMATE DECISIONMAKERS WERE NOT INFLUENCED BY BIASED COMPANY OFFICIALS

Respondent argues that a biased official in this case, Terebecki,[6] had no influence over the actions of

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[5] Brief for the United States as Amicus Curiae, *Staub v. Proctor Hospital*, No. 09-400, at 17-18:

> [R]espondent contends ... that certiorari is inappropriate because petitioner never argued below that the Seventh Circuit's *Brewer* standard is incorrect. Given the developed body of law in the Seventh Circuit on the cat's paw doctrine, however, it would have been futile for petitioner to argue before the district court and court of appeals for any different standard.... cf. *MedImmune Inc. v. Genetech Inc.*, 549 U.S. 118, 125 (2007). Thus, petitioner's failure to argue for a different standard below does not preclude a grant of certiorari.

[6] Similarly, respondent contends with regard to the other assertedly biased official, Salerno, that there was no evidence either that Salerno was biased against older workers or that

(Continued on following page)

the final decisionmakers. (Br. Opp. 8-9). In the absence of such influence, respondent insists, the correctness of the Eleventh Circuit *mere conduit* theory would have no impact on the outcome of this appeal. (Br. Opp. 9). Noting that the *district* court concluded that there was no evidence that Terebecki had any influence over the decisions to fire petitioners, respondent argues "[t]hus, the Eleventh Circuit decision would not change because there was *no* influence over the decisionmaker in this case." (Br. Opp. 9) (emphasis in original).

But whether the district court had erred in this conclusion regarding Terebecki's influence was clearly one of the issues raised on appeal and was expressly briefed by the parties in the Eleventh Circuit.[7] Respondent does not appear to seriously contend that the court of appeals actually addressed this fact-bound issue. At most respondent suggests that it may be unclear whether the Eleventh Circuit decided this question.[8]

Salerno had any influence over the decision to fire the plaintiffs. Here, as with Terebecki, the sufficiency of the evidence regarding those factual issues was one of the questions raised but not resolved in the court of appeals.

[7] Initial brief of Appellants/Cross-Appellees Lana Perez and Elena Leffler, at 40-44, 49-52; Brief for Defendant-Appellee-Cross-Appellant, at 32-33, 38-42; Answer Brief of Appellants/Cross-Appellees Lana Perez and Elena Leffler, at 26-36.

[8] Br. Opp. 6:

> Although the Eleventh Circuit quoted the "mere conduit" language included in the district court decision,

(Continued on following page)

The more plausible reading of the Eleventh Circuit's decision is that, rather than considering the complex fact-bound dispute about the extent of Terebecki's influence, the court of appeals simply decided this case on the narrower and easier ground that any such influence did not meet that Circuit's demanding mere conduit theory. There is no need for this Court to address respondent's strained account of the court of appeals decision, or to attempt to resolve the complex fact-bound dispute about Terebecki's role in the decision to dismiss plaintiffs.[9] Both of these are matters that should, and can best, be considered in the first instance by the court of appeals on remand.

CONCLUSION

For the above reasons, this Court should defer action on the petition pending the Court's decision in *Staub v. Proctor Hospital*.

> there is no indication that the Eleventh Circuit ... was avoiding decision on the supposed separate issue of whether Terebecki influenced Phelan's decision at all.

[9] Similarly, there is no need for this Court to address the unresolved (on appeal) dispute about the bias and influence of Salerno.

Respectfully submitted,

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